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UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
PORTLAND DIVISION

FITFOOD LLC dba VERDE COCINA,

Plaintiff,

vs.

OHIO SECURITY INSURANCE  
COMPANY,

Defendant.

CASE NO.: 3:22-cv-2010

COMPLAINT

BREACH OF CONTRACT

Claim over \$75,000  
Demand \$275,429.57

DEMAND FOR JURY TRIAL

COMES NOW the Plaintiff, represented by the undersigned attorney, and allege as follows:

VENUE AND JURISDICTION

1. At all times material hereto, FITFOOD LLC dba VERDE COCINA (hereafter “FITFOOD”) was a limited liability company with its principal place of business in Multnomah County, Oregon and owning property in Multnomah County, Oregon.
2. At all times material hereto, OHIO SECURITY INSURANCE COMPANY (hereafter “OHIO”), was an insurance corporation authorized to issue insurance and conduct business

COMPLAINT

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in the State of Oregon, but is a foreign carrier with its principal place of business headquartered in another state.

3. The claim and controversy in this matter exceeds \$75,000.00
4. The acts and/or omissions that form the basis of this complaint took place in the State of Oregon, this Court has jurisdiction over this matter pursuant to 28 USC §1332, and Venue is proper in the Portland Division.

FACTS MATERIAL TO FITFOOD’S CLAIMS FOR RELIEF

5. FITFOOD was the beneficial owner of certain real property located in Multnomah County , Oregon, and commonly referred to as 5515 SW Canyon Ct, Portland, OR 97221-2402 (hereafter “the Property”).
6. The Property contained a commercial building operating as a restaurant (hereafter “the Structure”) and FITFOOD’s personal property.
7. At all times material to this Complaint, the Property was insured by a businessowners policy issued by OHIO, specifically described as policy no.: BKS (20) 55 25 67 74 (hereafter “the Policy”).
8. The Policy listed FITFOOD as a named insured.
9. At all times material to this Complaint, all premiums due from FITFOOD were paid and the Policy was in full force and effect.
10. In consideration for payment of premiums by FITFOOD, the Policy promised to provide coverage for direct physical loss to FITFOOD’s Structure and personal property on an actual

cash value (ACV) and replacement cost (RCV) basis, code upgrades (ordinance and law) and other coverages set forth in the Policy.

11. On or about July 22, 2020, FITFOOD's Structure and personal property suffered direct physical loss (hereafter "the Loss").
12. FITFOOD filed a claim in connection with the Loss.
13. OHIO assigned Claim Number 23838437 (hereafter "the Claim").
14. OHIO accepted the Claim.
15. OHIO opened an investigation into the Claim.
16. OHIO accepted coverage for direct physical loss to the Structure and FITFOOD's personal property as a result of the Loss.
17. OHIO evaluated the damages as a result of the Loss.
18. OHIO issued payments in connection with the damages as a result of the Loss.
19. FITFOOD has performed all conditions precedent required for an ACV payment under the Policy.
20. FITFOOD has cooperated with OHIO's investigation and adjustment of the Claim and Loss.
21. OHIO agreed to toll the contractual limitations period of the Policy for the Loss until January 1, 2023.
22. As a result of the breaches of the Policy alleged herein, FITFOOD has been forced to hire an attorney to represent it in this matter. FITFOOD is entitled to recover its reasonable attorney fees incurred herein under ORS 742.061.

23. FITFOOD is entitled to recover prejudgment interest on its damages at the legal rate of 9% per annum.

CLAIM #1 – BREACH OF CONTRACT: FAILURE TO PAY– STRUCTURE DAMAGES

24. FITFOOD herein re-alleges and re-incorporates all preceding paragraphs into this cause of action.

25. FITFOOD submitted an evaluation of damages totaling \$715,607.78 on a replacement cost basis without the inclusion of code upgrades.

26. OHIO has issued payment in the amount of \$639,178.21 for its evaluation of damages on an actual cash value basis.

27. FITFOOD's anticipated code upgrades for the replacement of the Structure exceed \$200,000.

28. The Policy contains a \$1,000 deductible.

29. OHIO has failed, refused, or neglected to pay FITFOOD's full evaluation of damages.

30. OHIO's failure to pay is a breach of the Policy.

31. Due to circumstances outside FITFOOD's control, replacing the Structure within the time periods set forth in the Policy is impossible.

32. The impossibility of performing the conditions precedent to replacement cost coverages and code upgrades (ordinance and law) excuses FITFOOD from compliance with the conditions precedent of the Policy.

33. FITFOOD requested an additional tolling of the Policy's coverages and contractual limitations period; however, OHIO refused.

34. OHIO's refusal to provide a tolling agreement acted to obstruct and prevent FITFOOD from complying with the conditions precedent for replacement cost coverages and code upgrades (ordinance and law) under the Policy. Accordingly, FITFOOD is excused from performance of the replacement cost conditions of the Policy and is entitled to the replacement cost value of damaged property in the Loss, regardless of actual replacement.
35. As a result of the impossibility of performance, OHIO's breach of the Policy, and conduct alleged herein preventing FITFOOD's compliance with the replacement cost provisions of the Policy, FITFOOD has suffered an estimated \$275,429.57 for the damages to the Structure as a result of the Loss, regardless of actual repair or replacement.

CLAIM #2 – BREACH OF IMPLIED COVENANT

36. FITFOOD herein re-alleges and re-incorporates all preceding paragraphs into this cause of action.
37. OHIO failed to make payment, refused to make payment, and delayed full payment for covered losses, in violation of the policy of insurance, thus causing damages to FITFOOD.
38. OHIO violated the implied covenant of good faith and fair dealing in failing properly to investigate the loss, adjust the claim, and/or pay FITFOOD for all the losses sustained causing damages to FITFOOD.
39. It was foreseeable to OHIO that if it breached its obligations under the insurance policy, FITFOOD would suffer damages.
40. As a result of the breach of contract by OHIO, FITFOOD has suffered damages as set forth in paragraphs 35.

PRAYER

WHEREFORE, FITFOOD pray for judgment including:

1. \$275,429.57 for the remaining unpaid damages to the Structure;
2. Costs and disbursements incurred herein;
3. Attorneys' fees pursuant to ORS 742.061; and
4. Prejudgment interest of 9%.

DATED: December 31, 2022

**GOWER LAW LLC**

**s/ Nick Gower**

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